Supreme Court, U. S.
FILED
DEC 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-693

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

AND

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MICHAEL L. WEISSMAN,
AARON, AARON, SCHIMBERG & HESS,
33rd Floor East,
One First National Plaza,
Chicago, Illinois 60603,
312-236-8552,

LOUIS LOSS,
1545 Massachusetts Avenue,
Cambridge, Massachusetts 02138,
617-495-4626,
Attorneys for Respondent, Calvert Fire Insurance Company.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

SUBJECT INDEX.

	PAGE
Question Presented	1
Statement of the Case	2
Reasons for Denying the Writ of Certiorari	3
1. The Decision Below Does Not Raise a Question of Importance	4
2. There Is No Conflict Among the Circuits	7
Conclusion	8
Appendices:	
A. Defendant's Motion to Stay Proceedings, *American Mutual Reinsurance Company* v. *Calvert Fire Insurance Company*, No. 74 L 10737 (Cir. Ct. Cook County, Ill., Filed March 10, 1975)	A-1
B. Verified Petition for a Preliminary Injunction and Exhibits, *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company*, No. 75 C 103 (N. D. Ill., Filed April 24, 1975)	B-1

TABLE OF AUTHORITIES.

Cases.

Aetna State Bank v. Altheimer, 430 F. 2d 750 (7th Cir. 1970)	5
American Mutual Reinsurance Co. v. Calvert Fire Insurance Co., 367 N. E. 2d 104 (Ill. App. 1977)	3
Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976)	1
Cotler v. Inter-County Orthopaedic Association, P. A., 526 F. 2d 537 (3d Cir. 1975)	8
Jewell v. Davies, 192 F. 2d 670 (6th Cir. 1951), *cert. denied*, 343 U. S. 904 (1952)	7

Landis v. North American Co., 299 U. S. 248 (1936) 7
Lear Siegler, Inc. v. Adkins, 330 F. 2d 595 (9th Cir. 1964) 7
Lecor, Inc. v. United States District Court for the Central District of California, 502 F. 2d 104 (9th Cir. 1974) .. 7
Movielab v. Berkey Photo, Inc., 321 F. Supp. 806 (S. D. N. Y. 1970), *aff'd on other grounds*, 452 F. 2d 662 (2d Cir. 1971) 8
National Labor Relations Board v. Pittsburgh Steamship Co., 340 U. S. 498 (1951) 7
Thermtrom Products, Inc. v. Hermansdorfer, 423 U. S. 336 (1976) 6
United Mine Workers v. Gibbs, 383 U. S. 715 (1973) .. 6

Other Authorities.

Securities Exchange Act of 1934, § 27, 15 U. S. C. § 78bb 2
United States Judicial Code:
28 U. S. C. § 1292(b) 3
28 U. S. C. § 1446(b) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-693.

HONORABLE HUBERT L. WILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

AND

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTION PRESENTED.

Does *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976), authorize a federal district court to defer to a state court when (1) the federal court has exclusive jurisdiction and (2) there are no exceptional circumstances warranting either application of the abstention doctrine or deference for reasons of wise judicial administration?

STATEMENT OF THE CASE.

Without necessarily endorsing the petition's description (pp. 5-11) of the opinions of Judge Will and the court below, as well as the opinion of this Court in the *Colorado River* case—all of which speak for themselves—we accept the petition's statement of the facts (pp. 3-5). However, we must immediately disavow the statement in the petition that, "By the simple expedient of filing two suits, [Calvert] has endeavored to obtain two trials" (p. 15). Quite the contrary, the opinion below (together with the appendices to this brief) demonstrates that Calvert's aim throughout has been the securing of a federal forum for determination of a question of federal law, only to be rebuffed by both federal and state courts until the grant of its petition for a writ of mandamus:

(1) The first action, which sought a declaratory judgment, was filed by American Mutual in state court.

(2) Although there was diversity of citizenship, Calvert had no reason to remove that action to the federal court until counsel's research revealed the possibility of a "security" question under the Securities Exchange Act's Rule 10b-5, and by that time the thirty-day period for removal (28 U. S. C. § 1446(b)) had expired.

(3) Calvert had no choice but to protect itself on the state side by filing an answer and counterclaim. And it pleaded Rule 10b-5 as one of its defenses. But, because of the federal courts' exclusive jurisdiction under § 27 of the Securities Exchange Act (15 U. S. C. § 78bb), it did not include Rule 10b-5 in its counterclaim.

(4) On the very same day, January 10, 1975, Calvert filed an action against American Mutual in the federal court for rescission and damages under Rule 10b-5.

(5) Although the federal court was manifestly the only court with jurisdiction over the entire controversy, American Mutual

on February 5, 1975, filed a motion in that court for abatement or (on the contention that no "security" was involved) dismissal. On May 6, 1975, the federal court stayed everything except the Rule 10b-5 claim, but it has not ruled on the motion to dismiss.

(6) Far from wanting two trials, Calvert moved the state court, on March 10, 1975, to stay its proceedings (App. A). At that point the federal court had already received briefs on the federal "security" point (App. B, ¶ 8, p. B-5) and the state court had not even established a briefing schedule (*id.*, ¶ 12, p. B-6).

(7) American Mutual, nevertheless, opposed the motion for a stay, which was denied. And, perforce, Calvert has continued to protect itself in the state action by filing in the Illinois Supreme Court a petition for leave to appeal from the interlocutory ruling of the Illinois Appellate Court that affirmed the trial court's negative decision on the "security" question. *American Mutual Reinsurance Co.* v. *Calvert Fire Insurance Co.*, 367 N. E. 2d 104 (Ill. App. 1977).

(8) Having failed to persuade the *state* court to stay its proceedings, Calvert, on April 24, 1975, asked the *federal* court to enjoin American Mutual from proceeding on the state side (App. B). This, too, was unsuccessful.

(9) So were two other attempts to persuade the federal court to reconsider its stay order, as well as an attempt to seek interlocutory review under 28 U. S. C. § 1292(b).

(10) Having exhausted all other efforts to have the federal "security" question decided in a federal forum, Calvert at long last succeeded via the mandamus route.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

Summary of Argument.

The petition should be denied because there is neither an issue of sufficient importance nor a conflict among the circuits. The

case involves no more than a determination by the court below to bring its decisions on abstention in line with *Colorado River*.

1. The Decision Below Does Not Raise a Question of Importance.

First: The Court in *Colorado River* held (1) that the District Court's dismissal could not be supported by the abstention doctrine in any of its forms, but (2) that there were nevertheless "exceptional" circumstances, "considerably more limited than the circumstances appropriate for abstention," that permitted "the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration" (424 U. S. at 818). The three dissenting Justices disagreed only on the second point. The Court was unanimous on the abstention point.

Second: It is too clear to require argument that this case does not fall within any of the abstention categories explicated in *Colorado River*. And the lower court carefully considered the other factors that this Court enumerated as justifying dismissal (560 F. 2d at 796):

> The federal forum was not inconvenient for the parties, and the state court did not obtain concurrent jurisdiction before the federal court since the counterclaim and the federal action were filed on the same day. Piecemeal litigation can best be avoided by the federal court, which has exclusive jurisdiction over the Rule 10b-5 claim. Finally, the strong federal interest in the regulation of securities and the grant of exclusive jurisdiction in the federal courts to adjudicate claims under the Securities Exchange Act of 1934 are compelling factors which weigh heavily against deference to state proceedings.

Third: This is not a case of wholly federal concurrent jurisdiction. Nor is it a case of concurrent jurisdiction of federal and state courts over questions of state law. The "security" question is one of *federal* law, which evokes "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (424 U. S. at 817).

This obligation would exist, under *Colorado River*, even if the state courts were given concurrent jurisdiction over actions under the Securities Exchange Act, as was the situation with respect to the water rights involved in *Colorado River*. The petition is thus in the position of arguing for a *narrower* reading of *Colorado River's* learning in circumstances where that learning applies *a fortiori*.

Fourth: The lower court correctly concluded that *Colorado River* required it to overrule its decision in *Aetna State Bank* v. *Altheimer*, 430 F. 2d 750 (1970). The split among the eight sitting judges of the Seventh Circuit went solely to whether the decision to overrule should have been made in the context of an appeal rather than a mandamus proceeding (560 F. 2d at 796, n. 5). This is the *only* aspect of the opinion that makes it other than routine. And it is not sufficient to create a question that warrants this Court's attention.

Fifth: Far from ignoring the distinction between a dismissal (as in *Colorado River*) and a stay, as the petition alleges, the court below concluded that "the effect of the district court's order was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case" (560 F. 2d at 796).

Sixth: There is an equally short answer to the point made in the petition that Rule 10b-5 is pleaded as an affirmative defense in the state court action: It is one thing to permit a state court to entertain a federal *defense* of violation of Rule 10b-5 notwithstanding the federal courts' exclusive jurisdiction; for otherwise a plaintiff might obtain a judgment under state law without the court's adjudicating a defense based on the supreme law of the land. It is quite another thing for a federal court to sit on its hands pending adjudication of such a defense by the state court when the state court defendant is alleging a violation of Rule 10b-5 as a basis for relief in the federal court.

Seventh: In the last analysis—and notwithstanding the petition's attempt to make a fortress out of the volume of business in the federal courts*—the petition would have the only court with jurisdiction over Calvert's claim yield to a court that is simply without jurisdiction to grant any affirmative relief to which Calvert might be entitled under Rule 10b-5. And, even if it be assumed *arguendo* that a successful 10b-5 *defense* in the state courts would give Calvert substantially complete relief, abandonment here of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (424 U. S. at 817) would ignore two considerations bearing on the most efficient functioning of the country's dual system of courts:

(1) In considering the limits of pendent jurisdiction, the Court has cautioned that "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a sure-footed reading of applicable law." *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 726-27 (1973). Here, conversely, a "surer-footed reading" of the applicable *federal* law of securities regulation will be rendered by the considerably more experienced federal courts.

(2) If tried in a federal court, the basic question whether the reinsurance agreement here involved a "security" will be reviewable in a federal appellate court, whereas federal judicial review of the state courts' resolution of that federal issue would be possible only on review by this Court in the exercise of its certiorari jurisdiction.

Eighth: The petition's alarums about depriving district judges of "discretion to order their calendars to promote efficiency"

* The Court has had occasion quite recently to express its disapproval of the "crowded docket" rationale as an excuse for avoiding decision of federal claims: "* * * an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason." *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 344 (1976).

(p. 15) suffer from hyperbole. *Colorado River* recognized that there *were* circumstances apart from the traditional abstention categories that permitted federal judges to defer to their state brethren. That was the very point on which three Justices dissented. But the court below concluded that none of those circumstances was present here.

Consequently, unless the petition would have this Court overrule a landmark decision that is not yet two years old, all it amounts to is an attack on the lower court's application of the principles of *Colorado River* to the precise circumstances of this case—hardly a reason for the Court's exercise of its certiorari jurisdiction.

2. There Is No Conflict among the Circuits.

First: It is not enough that there be a "potential conflict," as the petition contends (p. 19). The conflict must be one that is "real and embarrassing." *NLRB* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502 (1951).

Second: The three cases cited in the petition establish no conflict, actual or "potential," even apart from their all having preceded *Colorado River:* The Ninth Circuit in *Lecor, Inc.* v. *United States District Court for the Central District of California*, 502 F. 2d 104 (1974), reached the same result as the Seventh Circuit in the case at bar. In the process the court distinguished the earlier case of *Lear Siegler, Inc.* v. *Adkins*, 330 F. 2d 595 (9th Cir. 1964), the second of the petition's trilogy. And *Jewell* v. *Davies*, 192 F. 2d 670 (6th Cir. 1951), *cert. denied*, 343 U. S. 904 1952), involved title to real estate, one of the "exceptional circumstances" referred to in *Colorado River*.

Third: Instead of creating a conflict, the decision below has brought the Seventh Circuit into harmony with decisions in other circuits holding that mandamus will issue to prevent abstention in cases involving exclusive jurisdiction under the

federal securities laws. *Cotler* v. *Inter-County Orthopaedic Association, P. A.*, 526 F. 2d 537 (3d Cir. 1975); *Movielab, Inc.* v. *Berkey Photo, Inc.*, 321 F. Supp. 806 (S. D. N. Y. 1970), *aff'd on other grounds*, 452 F. 2d 662 (2d Cir. 1971).

Fourth: Surely no "conflict" warranting exercise of the Court's certiorari jurisdiction is created by the remarks of the learned judges below who favored a rehearing *en banc*. Those judges have decided nothing; their remarks merely reflect dissatisfaction with the decision not to rehear the matter. If there had been a rehearing *en banc*, all four might well have concurred with the panel that decided the matter. What is important to note is that those who favored a rehearing *en banc* were not able to muster a majority of the court.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL L. WEISSMAN,
AARON, AARON, SCHIMBERG & HESS,
33rd Floor East,
One First National Plaza,
Chicago, Illinois 60603,
312-236-8552,

LOUIS LOSS,
1545 Massachusetts Avenue,
Cambridge, Massachusetts 02138,
617-495-4626,
Attorneys for Respondent, Calvert Fire Insurance Company.

December, 1977.

APPENDIX A.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY,
Plaintiff.
vs.
CALVERT FIRE INSURANCE COMPANY,
Defendant.
No. 74 L 10737

NOTICE OF MOTION

To: Thomas J. Weithers and
John L. Kirkland
Hinshaw, Culbertson, Moelman, Hoban & Fuller
69 West Washington Street
Chicago, Illinois 60602

On March 10, 1975, at 9:30 a.m. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Arthur L. Dunne (Room 2510), or any judge sitting in his stead, in the courtroom usually occupied by him in the Chicago Civic Center, Chicago, Illinois, and present the motion of defendant to stay proceedings.

Name Michael L. Weissman
Aaron, Aaron, Schimberg & Hess
Address 33rd Floor East
One First National Plaza
Telephone 236-8552
Attorney for Calvert First Insurance Company
City Chicago, Illinois 60603

Copy received_____, 19____, at _____, ____m.

PROOF OF SERVICE BY DELIVERY

I, Michael L. Weissman, attorney for the defendant, certify on March 6, 1975, I served this notice by delivering a copy personally to each person to whom it is directed.

/s/ MICHAEL L. WEISSMAN
Michael L. Weissman

(If not the attorney)
Signed and sworn to before me
....., 19.....

.....
Notary Public

PROOF OF SERVICE BY MAIL

I, ...:
(the attorney, certify) (a non-attorney, on oath state)
I served this notice by mailing a copy to.....
at .....
(address which appears on envelope)
and depositing the same in the U.S. mail at .....,
(place of mailing)
at.....m. on ....., 19....., with proper postage prepaid.

(If not the attorney)
Signed and sworn to before me
....., 19.....

.....
Notary public

NOTE: If more than one person is served by mail, additional proof of service may be made on the reverse side.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department—Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, *Plaintiff,* *vs.* CALVERT FIRE INSURANCE COMPANY, *Defendant.*	No. 74 L 10737

DEFENDANT'S MOTION TO STAY PROCEEDINGS

Now comes the defendant, CALVERT FIRE INSURANCE COMPANY ("Calvert") by its attorney, Michael L. Weissman, and moves for a stay of these proceedings for the following reasons:

1. On January 10, 1975 Calvert filed its Answer and Counterclaim in this cause.

2. On January 10, 1975 Calvert also filed an action against plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY ("Amreco"), in the United States District Court for the Northern District of Illinois, Eastern Division, Docket No. 75 C 103. Said action has been assigned to and is being heard by the Honorable Hubert L. Will.

3. Calvert's counterclaim in this proceeding and its complaint the federal court action involve the question of whether or not Amreco's offer and sale to Calvert of a participatory interest in the 1974 Multiple Line Pool constituted a violation of the Securities Act of 1933 and the Securities Exchange Act of 1934.

4. Amreco has moved in the federal court action to abate the proceeding or, in the alternative, to dismiss it. The issue raised by such motion is whether or not Amreco offered and sold a

"security" to Calvert within the meaning and intention of the Securities Act of 1933 and the Securities Exchange Act of 1934.

5. On February 14, 1975 Judge Will entered an order establishing a briefing schedule on the federal securities law questions. A decision on these questions has been scheduled by Judge Will for March 31, 1975.

6. The decision to be rendered by Judge Will on March 31, 1975 will affect, and may be totally dispositive of, both the federal court action and this proceeding. It would not be conducive to judicial economy for this Court to conduct further proceedings until the federal securities law questions have been fully resolved.

WHEREFORE, defendant, CALVERT FIRE INSURANCE COMPANY, prays that this Court stay all proceedings herein pending a final resolution of all issues under the federal securities acts.

CALVERT FIRE INSURANCE COMPANY
By: /s/ MICHAEL L. WEISSMAN
Its Attorney

MICHAEL L. WEISSMAN
AARON, AARON, SCHIMBERG & HESS
33rd Floor—East
One First National Plaza
Chicago, Illinois 60603
236-8552

STATE OF ILLINOIS }
COUNTY OF COOK } ss

AFFIDAVIT OF SERVICE

I, MICHAEL L. WEISSMAN, first being duly sworn on oath, depose and say that I served a copy of the within and foregoing Defendant's Motion to Stay Proceedings to Thomas J. Weithers, Esq., and John L. Kirkland, Esq., attorneys for the plaintiff, at Suite 2700, 69 West Washington Street, Chicago, Illinois 60602, by causing a true and correct copy thereof to be delivered to them at said address this 6th day of March, 1975.

/s/ MICHAEL L. WEISSMAN
Michael L. Weissman

Subscribed and Sworn to before me this 6th day of March, 1975.

/s/ SYLVIA D. HAVIDIC
Notary Public

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CALVERT FIRE INSURANCE COMPANY, a Pennsylvania corporation,
Plaintiff,

vs.

AMERICAN MUTUAL REINSURANCE COMPANY, an Illinois corporation,
Defendant.

No. 75 C 103

NOTICE OF MOTION

To: Messrs. Thomas J. Weithers
and John L. Kirkland
Hinshaw, Culbertson, Moelman,
Hoban & Fuller
69 West Washington Street
Chicago, Illinois 60602

PLEASE TAKE NOTICE that on Thursday, April 24, 1975, at the hour of 10:00 A. M., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Hubert L. Will, United States District Judge, in the courtroom usually occupied by him in the Federal Building, 219 South Dearborn Street, Chicago, Illinois, and there and then present plaintiff's Verified Petition for a Preliminary Injunction, a copy of which is attached hereto and served upon you, at which time and place you may appear if you so desire.

CALVERT FIRE INSURANCE COMPANY
By: /s/ MICHAEL L. WEISSMAN
Michael L. Weissman
Attorney for Plaintiff

AARON, AARON, SCHIMBERG & HESS
33rd Floor East
One First National Plaza
Chicago, Illinois 60603
236-8552

CERTIFICATE OF SERVICE

MICHAEL L. WEISSMAN, the attorney for CALVERT FIRE INSURANCE COMPANY, plaintiff herein, hereby certifies that he caused a copy of the within and foregoing Notice of Motion and a copy of the Verified Petition for a Preliminary Injunction referred to therein to be delivered to Messrs. Thomas J. Weithers and John L. Kirkland, attorneys for AMERICAN MUTUAL REINSURANCE COMPANY, defendant herein, at their offices at 69 West Washington Street, Chicago, Illinois, this 23rd day of April, 1975.

/s/ MICHAEL L. WEISSMAN
Michael L. Weissman

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CALVERT FIRE INSURANCE COMPANY, a Pennsylvania corporation,
Plaintiff,

vs.

AMERICAN MUTUAL REINSURANCE COMPANY, an Illinois corporation,
Defendant.

No. 75 C 103

VERIFIED PETITION FOR A PRELIMINARY INJUNCTION

Now comes CALVERT FIRE INSURANCE COMPANY, a Pennsylvania corporation, plaintiff in the above-entitled proceeding, by Michael L. Weissman, its attorney, and states as follows:

1. On January 10, 1975, CALVERT FIRE INSURANCE COMPANY ("Calvert") filed this action against AMERICAN MUTUAL REINSURANCE COMPANY, an Illinois corporation ("Amreco"), alleging, in substance, that a participatory interest in a reinsurance Pool had been sold to it by Amreco in violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and related state securities laws.

2. The filing of this action had been preceded by the filing of a declaratory judgment proceeding by Amreco in the Circuit Court of Cook County, Illinois, Docket No. 74 L 10737. At the date on which this action was filed, there was pending in said state court proceeding a Motion to Dismiss filed by Calvert which contended that Amreco was without authority to institute

a declaratory judgment proceeding on behalf of all of the 99 insurance companies which were members of the reinsurance Pool. At that date, no discovery proceedings were in process, Amreco having agreed to the entry of an order staying all depositions pending the disposition of all Motions to Dismiss.

3. Concurrently with the filing of this action, Calvert filed its Answer and Counterclaim in the declaratory judgment proceeding in the Circuit Court of Cook County, Illinois. In order to avail itself of all possible defenses, Calvert raised in its Answer and Counterclaim in said state court proceeding the violations of the 1933 and 1934 Acts and the state securities laws which it contends were committed by Amreco.

4. Thereupon, Amreco filed a Motion to Abate or, in the Alternative, to Dismiss this cause on the grounds that the participatory interest which Amreco offered and sold to Calvert was not a security within the meaning of the 1933 and 1934 Acts and the said state securities laws.

5. This Court then established a briefing schedule which called for Amreco's Memorandum in support of its Motions to be filed by February 21, 1975, for Calvert's answering Memorandum to be filed by March 3, 1975 and for Amreco's reply Memorandum to be filed by March 10, 1975. Both Calvert and Amreco complied with the briefing schedule established by this Court.

6. On April 9, 1975, this Court held that it had jurisdiction of Calvert's claim for damages under the 1934 Act and indicated that a ruling on whether the participatory interest in the reinsurance Pool was a security could be expected in the near future.

7. The issues raised by Amreco's Motion to Dismiss may be dispositive of the entire controversy between the parties. That is to say, should this Court determine that the participatory interest in the reinsurance Pool which Amreco offered and sold to Calvert was a security which was offered and sold without prior registration, then it follows that Calvert's exercise of its right of

rescission was both timely and valid and that there is no basis whatsoever upon which Amreco can make any claim against Calvert.

8. In an effort to avoid unnecessary duplication of effort, your petitioner presented a motion to The Honorable Arthur L. Dunne, Judge of the Circuit Court of Cook County, Illinois, on March 10, 1975 requesting a temporary stay of the state court proceeding pending a definitive resolution of the federal securities laws issues in this Court. The motion was based upon the fact that a resolution of these issues would undoubtedly proceed more rapidly before this Court since this Court had already directed that briefs be submitted thereon and said briefs had, in fact, been filed in response to said order.

9. Although counsel for Amreco had raised the issue of the applicability of the federal securities laws and the McCarran-Ferguson Act by motion to this Court and had actively participated in the preparation of briefs in response to this Court's order, he opposed the motion for a stay of proceeding before Judge Dunne. As a consequence, Judge Dunne denied the motion to stay filed by Calvert.

10. In the course of the argument on the motion to stay before Judge Dunne on March 10, 1975, there occurred the following colloquy:

> "MR. WEISSMAN: Your Honor, the issues that are before the Federal Court are issues arising under the Federal Securities law of 1933, the Federal Securities Exchange Act, 1934, the McCarron-Ferguson Act, all statutes, basically, essentially, federal jurisdictions, federal competence, which, frankly, with all due deference to our eminent jurists in the State Court System, are much more frequently dealt with by the judges in the Federal Court System, and I think, frankly, they can more expeditiously rule on them than perhaps can be done—
>
> THE COURT: I read an article in the paper—I won't mention the name of the paper—that 13 judges in the Federal Court disposed of 270 criminal cases in the first

six months over there in the Federal Court. The State judges disposed of 250 or 300 cases a year. So I take it that means that we are working seven times as hard as a Federal Judge.

I agree with you absolutely that the Federal Judges are far more familiar with the Act that you mentioned than I am. I have not looked at them since I was in the U. S. Attorney's Office.

I, along with others of my judges, grow increasingly disturbed by the expansion of the hoary lawyers' gambit of forumshopping, if you will. I have no criticism of your filing of this matter in that court, and you have an absolute right to, but I see this time and time again, especially in this court, where lawyers for one side or the other will say, "Judge, we filed the same matter in the Federal Court," and then, along with waiting for the State Appellate procedure, I take it we are obligated to wait for the Federal Appellate procedure. I do not feel that it is appropriate or necessary in these cases, especially in a case of this nature, which I have reviewed on several occasions and which I consider relatively simple."

11. Inasmuch as your petitioner has made a bona fide and good faith effort to induce the Judge of the Circuit Court of Cook County, Illinois, before whom the state court proceeding is presently pending to stay such proceeding pending a resolution of the federal securities laws issues and has been denied such relief, it is necessary and appropriate that your petitioner request that this Court enjoin Amreco and its counsel from engaging in further proceedings in the Circuit Court of Cook County, Illinois.

12. The necessity for such relief is demonstrated by the fact that on Friday, April 25, 1975, at the hour of 9:30 A.M., counsel for Amreco intends to appear before Judge Dunne on Amreco's Motion to Dismiss Calvert's Counterclaim (Exhibit "A" hereto) pursuant to a Notice of Motion served April 22, 1975 (Exhibit "B" hereto). Amreco intends to establish a briefing schedule on the very issues which this Court has indicated it will rule upon.

13. Calvert will be irreparably injured unless injunctive relief is granted by this Court since it will then have to raise the same issues as have been briefed before this Court by motion before Judge Dunne, will subject itself to possibly inconsistent rulings by this Court and by Judge Dunne and may then have to pursue one or more appeals in order to reconcile such rulings, all of which will be costly and can be avoided by the granting of the requested relief at this stage of the proceedings.

14. The appropriateness of the relief requested by your petitioner is demonstrated by the fact that it was Amreco which first presented the issues in question by the filing of its Motion to Dismiss in this Court rather than in the Circuit Court of Cook County, Illinois. Amreco should not be permitted to undermine the jurisdiction of this Court, particularly since it was Amreco which first brought these issues on for decision by this Court.

WHEREFORE, CALVERT FIRE INSURANCE COMPANY prays that this Court enter a preliminary injunction enjoining AMERICAN MUTUAL REINSURANCE COMPANY, and its counsel, from engaging in any further proceedings in the declaratory judgment action now pending in the Circuit Court of Cook County, Illinois, Docket No. 74 L 10737, until such time as there has been a ruling in this Court on the issues now pending before this Court.

CALVERT FIRE INSURANCE COMPANY
By: /s/ MICHAEL L. WEISSMAN
Michael L. Weissman
Its Attorney

AARON, AARON, SCHIMBERG & HESS
33rd Floor East
One First National Plaza
Chicago, Illinois 60603
236-8552

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

AFFIDAVIT

MICHAEL L. WEISSMAN, being first duly sworn on oath, deposes and says that he is the attorney for CALVERT FIRE INSURANCE COMPANY, the petitioner in the above-entitled petition; that he has personal knowledge of the facts set forth in the foregoing petition; and that the statements contained in the foregoing petition are true in substance and in fact according to the best of his knowledge and belief.

/s/ MICHAEL L. WEISSMAN
Michael L. Weissman

Subscribed and sworn to before me this 23rd day of April, 1975.

/s/ SYLVIA D. HAVIDIC
Notary Public

EXHIBIT "A"

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, Individually, and for the use of 99 property and casualty insurance companies who are participants in the 1974 AMRECO Multiple Line Pool, *Plaintiff,*	No. 74 L 10737
vs.	
CALVERT FIRE INSURANCE COMPANY, *Defendant.*	

MOTION TO DISMISS COUNTERCLAIM

Now comes the plaintiff, counter-defendant, AMERICAN MUTUAL REINSURANCE COMPANY, by its attorneys, HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, and respectfully moves this Court to strike and dismiss the Counterclaim filed herein by defendant, counter-plaintiff, CALVERT FIRE INSURANCE COMPANY, and for reason thereto, states as follows:

Count I

1. That defendant, counter-plaintiff's Counterclaim, Count I, Paragraphs One, Two, Three and Six thereof, purport to allege that its reinsurance contract with AMRECO constitutes a "security as defined by § 2(1) of the Securities Act of 1933, as amended, and that "the security was not registered in violation of § 5 of the Securities Act of 1933."

2. That on the basis of the provisions of the Securities Act of 1933, counter-plaintiff alleges that it is entitled to recision on the basis of § 12(1) of the Securities Act of 1933.

3. That counter-plaintiff's Counterclaim fails to state a claim upon which relief may be granted because:

(a) The McCarren-Gerguson Act, 15 U.S.C.A. §§ 1101-1105, precludes the application of the Securities Act of 1933 to the "business of insurance" when that business is subject to regulation by a State;

(b) Counter-plaintiff, CALVERT FIRE INSURANCE COMPANY, was not, as a matter of law, a purchaser of a security, but rather, a seller of reinsurance contracts;

(c) Counter-defendant, AMRECO's contract with counter-plaintiff, CALVERT, does not constitute a "security" as that term has been defined by § 2(1) of the Securities Act of 1933;

(d) Counter-defendant, AMRECO's reinsurance contract with counter-plaintiff, CALVERT, is exempt from registration under § 3(a)(8) of the 1933 Act.

Count II

1. That defendant, counter-plaintiff's Counterclaim, Counts II and III thereof, purport to allege that its reinsurance contract with AMRECO constitutes a "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"), Ill. Rev. Stat. Ch. 121½ § 137-2.1, and Rule 130 promulgated thereunder and as defined by § 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. Act 32A, § 26(a)(5), respectively.

2. That defendant, counter-plaintiff's Counterclaim, Counts II and III thereof, fail to state a claim upon which relief may be granted because AMRECO's reinsurance contract does not constitute a "security" as defined by § 137-2.1 of the Illinois Securities Law of 1953, as amended (the "Illinois Securities Law"),

Ill. Rev. Stat., Ch. 121½ § 137-2.1 and Rule 130 promulgated thereunder and as defined by § 26(a)(5) of the Maryland Securities Act, as amended ("Maryland Securities Act"), Md. Code Ann. Act 32A § 26(a)(5), respectively.

Count III

Now comes plaintiff, counter-defendant, AMRECO, by its attorneys, HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, and in answer to Count IV of counter-plaintiff's Counterclaim, states as follows:

1. The defendant denies each and every allegation contained in Paragraph One of Count IV of counter-plaintiff's Counterclaim.

2. The counter-defendant, AMRECO, denies each and every allegation contained in Paragraph Two of Count IV of counter-plaintiff's Counterclaim.

3. The counter-defendant, AMRECO, denies each and every allegation contained in Paragraph Three of Count IV of counter-plaintiff's Counterclaim.

4. The counter-defendant, AMRECO, denies each and every allegation contained in Paragraph Four of Count IV of counter-plaintiff's Counterclaim.

WHEREFORE, AMERICAN MUTUAL REINSURANCE COMPANY, denies that the defendant, CALVERT FIRE INSURANCE COMPANY, is entitled to a judgment in the sum of two million dollars ($2,000,000.00) or any other relief whatsoever.

HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER

By: .....

Attorneys for Plaintiff, Counter-Defendant, American Mutual Reinsurance Company

HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER
69 West Washington Street—Suite 2700
Chicago, IL 60602
630-4400

EXHIBIT "B"

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Law Division

AMERICAN MUTUAL REINSURANCE COMPANY, etc.,
Plaintiff,
vs.
CALVERT FIRE INSURANCE COMPANY,
Defendant.
No. 74 L 10737

NOTICE OF MOTION

To: Aaron, Aaron, Schimberg & Hess
Mr. Michael L. Weissman
One First National Plaza
Chicago, Illinois 60670

On Friday, April 25, 1975, at 9:30 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Arthur L. Dunne, room 2510 or any judge sitting in his stead, in the courtroom usually occupied by him in the Chicago Civic Center, Chicago, Illinois and will then and there move for leave to file instanter the "Brief in Support of American Mutual Reinsurance Company's Motion to Dismiss," and will further move for the setting of a briefing schedule.

Name Hinshaw, Culbertson, Moelmann, Hoban & Fuller
Attorney for Plaintiff, AMERICAN MUTUAL REINSURANCE COMPANY
Address 69 West Washington Street
City Chicago, Illinois 60602
Telephone 630-4400

Copy received * *, 19....., at....., ...m.
** together with copy of "Motion to Dismiss Counterclaim"

AARON, AARON, SCHIMBERG & HESS
By /s/ MICHAEL L. WEISSMAN

CERTIFICATE OF ATTORNEY

I certify that on ....., 19....., I served this notice by ..... a copy to each person to whom
(delivering) (mailing)
it is directed.

.....
Attorney

AFFIDAVIT OF SERVICE

..... on oath states: On April 22, 1975, I served this notice by delivering a copy to each person to whom it is directed.

Signed and sworn to before me
April 22, 1975

.....
Notary public